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AMENDED APPEAL BRIEF (29 PGS)

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of :

Appellant : Graham et al.
Filed : August 31, 2001
Serial No. : 09/945,378
Title : COMPUTERIZED SYSTEM AND METHOD FOR
PROVIDING ADVERTISING TO A CONSUMER
Docket No. : CGR03-GN003
Examiner : Bekerman, Michael
Art Unit : 3622
Tech. Center : 3600

Hon. Commissioner for Patents
Alexandria, VA 22313

Dear Sir:

AMENDED APPEAL BRIEF

This Amended Appeal Brief is in response to the Notification of Non-Compliant Appeal Brief mailed June 26, 2007, which listed the following deficiencies:

- The status of all claims on appeal has not been identified.
- The heading Evidence Appendix is missing All evidence should be submitted in this section (2002/0098891).

In a telephone conference on July 2, 2007, Ms. Darlene Brown of the Appeals Section agreed that:

- The Appeal Brief included a proper statement of the status of the claims.
- While the Appeal Brief included a proper Evidence Appendix, the additional "Related Materials Appendix" was improper.

Accordingly, this Amended Appeal Brief no longer includes a "Related Materials Appendix" or any reference thereto. Likewise, the Summary of Claimed Subject Matter section properly refers to the specification as originally filed by page and line numbers.

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(1) Real Party in Interest

Adternity, Inc., is the real party in interest by way of assignment from Michael B. Graham, John A. Woffington IV, and Steven P. Wolf, recorded on reel 012827, frame 0659.

(2) Related Appeals and Interferences

Appellants and Appellants' representative are not aware of any other appeal or interference that will directly affect, would be directly affected by, or would have a bearing on the Board's decision in the instant appeal.

(3) Status of the Claims

Claims 33-49 and 64-70 are pending.

Claims 1-32 and 50-63 have been cancelled.

Appellants are appealing the rejections of claims 33-49 and 64-70.

Claims 33-37, 42, 44-49 and 64-70 stand rejected as being allegedly obvious over U.S. Patent No. 6,764,395 ("Guyett") in view of U.S. Patent App. Pub. No. 2003/0191690 ("McIntyre").

Claims 38-41 and 43 stand rejected as being allegedly obvious over Guyett in view of McIntyre, in further view of U.S. Patent No. 5,679,075 ("Forrest").

(4) Status of Amendments

In an After-Final Amendment submitted January 8, 2007, Appellants amended the abstract and cancelled claims 2-7, 10-13, 15-20, and 23-32.

In an Advisory action having a mailing date of February 5, 2007, the Office indicated that the amendments submitted by Appellants on January 8 would be entered for purposes of appeal.

(5) Summary of the Claimed Subject Matter

On appeal, the claims are directed to a computerized method for measuring a consumer's perception of a commercial entity's brand equity, logo, trademark, tradename, tag line, product name and the like, comprising the steps of: (a) providing a

present interactive advertising message to the consumer; (b) allowing the consumer to interact with the present interactive advertising message; (c) gathering data associated with the consumer's interactions with the present interactive advertising message; (d) generating a statistical report from the data; and (e) providing the statistical report to the commercial entity.

Other claims on appeal are directed to a computerized method for at least one of providing advertising to a consumer and for gathering statistical data from the consumer associated with at least one of a commercial entity's products and services, comprising the steps of: (a) providing a computerized game to a consumer, the game including the step of testing the consumer's ability to recognize a marketing object associated with the commercial entity, the marketing object taken from a group consisting of: the commercial entity's logo, the commercial entity's trademark, the commercial entity's tradename, the commercial entity's tag line, the commercial entity's product name, a competitor's logo, a competitor's trademark, a competitor's tradename, a competitor's tag line and a competitor's product name; (b) gathering data associated with the consumer's interactions with the computerized game; (c) generating a statistical report from the data; and (d) providing the statistical report to the commercial entity.

Each of the two independent claims on appeal, claims 33 and 67, is segmented below, the limitations of which appear in bolded text, along with italicized citations to support found in the specification for the limitations recited.

Independent claim 33 is directed to a computerized method for measuring a consumer's perception of a commercial entity's brand equity, logo, trademark, tradename, tag line, product name and the like, comprising the steps of:

(a) **providing a present interactive advertising message to the consumer** (*Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 33 itself. Page 4, lines 24 – 29 of the application as originally filed also provide express support for this limitation. Further, page 12, lines 11 – 32 of the application as originally filed provide an example of a puzzle used to present an interactive advertising message to a consumer. Other portions of the specification as originally filed also provide support for this limitation such as, without limitation, page 13, line 1 – page 16, line 15.*);

(b) allowing the consumer to interact with the present interactive advertising message *(Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 33 itself. Page 4, lines 24 – 29 of the application as originally filed also provide express support for this limitation. Further, page 12, lines 11 – 32 of the application as originally filed provide an example of a puzzle that allows the consumer to interact with the interactive advertising message. Other portions of the specification as originally filed also provide support for this limitation such as, without limitation, page 13, line 1 – page 16, line 15.);*

(c) gathering data associated with the consumer's interactions with the present interactive advertising message *(Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 33 itself. Page 4, lines 24 – 29 of the application as originally filed also provide express support for this limitation. Further, page 13, lines 15 – 21 of the application as originally filed provide support for gathering data associated with the consumers interactions with the interactive advertising message, such as measuring the consumer's recall of a commercial entity's tag line. Other portions of the specification as originally filed also provide support for this limitation such as, without limitation, page 16, line 16 – page 18, line 11.);*

(d) generating a statistical report from the data *(Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 33 itself. Page 4, lines 24 – 29 of the application as originally filed also provide express support for this limitation. Further, page 22, lines 1 – 27 of the application as originally filed provide support for generating a statistical report from the data, such as generating statistical reports from demographic and performance data as a result of users playing the games.); and*

(e) providing the statistical report to the commercial entity *(Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 33 itself. Page 4, lines 24 – 29 of the application as originally filed also provide express support for this limitation. Further, page 22, line 28 – page 23, line 7 of the application as originally filed provide support for providing the*

statistical report to the commercial entity, such as providing the statistical report to a commercial entity whose brand names were featured in the games/puzzles.).

Independent claim 67 is directed to a computerized method for at least one of providing advertising to a consumer and for gathering statistical data from the consumer associated with at least one of a commercial entity's products and services, comprising the steps of:

(a) providing a computerized game to a consumer, the game including the step of testing the consumer's ability to recognize a marketing object associated with the commercial entity, the marketing object taken from a group consisting of: the commercial entity's logo, the commercial entity's trademark, the commercial entity's tradename, the commercial entity's tag line, the commercial entity's product name, a competitor's logo, a competitor's trademark, a competitor's tradename, a competitor's tag line and a competitor's product name *(Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 67 itself. Page 6, lines 10 – 22 of the application as originally filed also provide express support for this limitation. Further, page 12, lines 11 – 32 of the application as originally filed provide examples of a computerized games used to present an interactive advertising message to a consumer. Other portions of the specification as originally filed also provide support for this limitation such as, without limitation, page 13, line 1 – page 16, line 15.);*

(b) gathering data associated with the consumer's interactions with the computerized game *(Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 67 itself. Page 6, lines 10 – 22 of the application as originally filed also provide express support for this limitation. Further, page 13, lines 15 – 21 of the application as originally filed provide support for gathering data associated with the consumers interactions with the computerized game, such as measuring the consumer's recall of a commercial entity's tag line. Other portions of the specification as originally filed also provide support for this limitation such as, without limitation, page 16, line 16 – page 18, line 11.);*

(c) generating a statistical report from the data *(Support for this limitation is found in the claims beginning on page 24 of the application as originally filed,*

particularly claim 67 itself. Page 6, lines 10 – 22 of the application as originally filed also provide express support for this limitation. Further, page 22, lines 1 – 27 of the application as originally filed provide support for generating a statistical report from the data, such as generating statistical reports from demographic and performance data as a result of users playing the computerized games.); and

(d) providing the statistical report to the commercial entity (Support for this limitation is found in the claims beginning on page 24 of the application as originally filed, particularly claim 67 itself. Page 6, lines 10 – 22 of the application as originally filed also provide express support for this limitation. Further, page 22, line 28 – page 23, line 7 of the application as originally filed provide support for providing the statistical report to the commercial entity, such as providing the statistical report to a commercial entity whose brand names were featured in the computerized games.).

(6) Grounds of Rejection and Objection to be Reviewed on Appeal

Appellants are appealing two rejections lodged under 35 U.S.C. § 103(a). The first ground of rejection appealed is premised on the assertion that claims 33-37, 42, 44-49, and 64-70 are allegedly unpatentable over U.S. Patent No. 6,764,395 to Guyett (“Guyett”) in view of U.S. Patent Application Publication No. 2003/0191690 to McIntyre (“McIntyre”). Specifically, the Examiner asserts that as to the independent claims, Guyett discloses all the limitations but for “generating a statistical report and sending it to the commercial entity.”¹ However, the Examiner also asserts that McIntyre discloses these missing limitations and that it would have been obvious to one skilled in the art to combine Guyett with McIntyre to practice the steps of Appellants’ claims 33-37, 42, 44-49, and 64-70. More specifically, the Examiner’s position is that McIntyre “teaches a statistical report that keeps track of how many times a game is played and the sending of this report to sponsors of the game (Paragraph 0008).”²

Appellants have reviewed McIntyre and find the bases for the Examiner’s conclusions to be unfounded. McIntyre neither discloses the generation of any statistical report as claimed, nor does it disclose the step of providing that statistical report to the

¹ September 6, 2006 Office action, p. 7.

² September 6, 2006 Office action, p. 7.

commercial entity as claimed. At best McIntyre discloses a step of billing a sponsor according to the number of times a sponsor's advertising is displayed. Consequently, even if Guyett and McIntyre were combined, one of ordinary skill still would not reach the invention as recited in claims 33/67 because the resulting combination fails to disclose: (a) generating a statistical report from the data [associated with the consumer's interactions with the present interactive advertising message/computerized game]; or (b) providing the statistical report to the commercial entity. Even if it is determined that Guyett in combination with McIntyre discloses all the limitations of Appellants' claims, such a combination is impermissible because McIntyre teaches away from Appellants' claimed invention. Specifically, McIntyre discloses that advertisers are not to be directly contacted, thereby inhibiting receiving any consumer feedback. For at least the above reasons, it is respectfully submitted that independent claims 33 and 67 are allowable over the combination of Guyett and McIntyre. Likewise, claims 34-49 and 64-66 depend from claim 33 and claims 68-70 depend from claim 67 are also allowable for at least the same reasons.

The second appealed ground of rejection is premised on the assertion that claims 38-41 and 43 are allegedly unpatentable over Guyett in view of McIntyre, in further view of U.S. Patent No. 5,679,075 to Forrest ("Forrest"). Specifically, the Examiner asserts that as to independent claims 33 and 67, Guyett discloses all the limitations but for "generating a statistical report and sending it to the commercial entity."³ Nonetheless, the Examiner asserts that McIntyre discloses these missing limitations. The additional limitations of claims 38-41 and 43, however, require providing a subsequent puzzle from a plurality of puzzles based on consumer performance, which the Examiner agrees is not disclosed by either Guyett or McIntyre. Nevertheless, the Examiner concludes that Forrest discloses this missing limitation, as well as the fact that it would have been obvious to one skilled in the art to combine Guyett with McIntyre and with Forrest to practice the steps of Appellants' claims 38-41 and 43. Again, it is the Examiner's position that McIntyre "teaches a statistical report that keeps track of how many times a game is played and the sending of this report to sponsors of the game (Paragraph 0008)."⁴

³ September 6, 2006 Office action, p. 7.

⁴ September 6, 2006 Office action, p. 7.

Appellants disagree with the Examiner as to what McIntyre discloses. In Appellants view, the combination of Guyette and McIntyre fails to disclose: (a) generating a statistical report from the data [associated with the consumer's interactions with the present interactive advertising message/computerized game]; or (b) providing the statistical report to the commercial entity. Forrest also fails to disclose these limitations. Thus, presuming only for arguments sake that the combination of these three references is permissible, the combination fails to disclose each and every one of the limitations of claims 38-41 and 43. Even if it is determined that Guyett in combination with McIntyre and Forrest discloses all the limitations of Appellants' claims, such a combination is impermissible because McIntyre teaches away from Appellants' claimed invention. Specifically, McIntyre discloses that advertisers are not to be directly contacted, thereby inhibiting receiving any consumer feedback. For this reason alone, claims 38-41 and 43 are allowable.

In view of the foregoing grounds of rejection lacking necessary factual foundation, Appellants request review and reversal of the aforementioned grounds of rejection.

(7) Argument

Ground of Rejection #1

I. Claims 33-37, 42, 44-49, and 64-70 are improperly rejected under 35 U.S.C. § 103(a) because the alleged combination of Guyett with McIntyre fails to disclose all of Appellants' claimed limitations

Summary

In the final Office action, claims 33-37, 42, 44-49, and 64-70 are allegedly unpatentable over U.S. Patent No. 6,764,395 to Guyett ("Guyett") in view of U.S. Patent App. Pub. No. 2003/0191690 to McIntyre ("McIntyre"). Appellants are contesting this ground of rejection as the combination of Guyett with McIntyre fails to disclose each and every one of the limitations recited in Appellants' claims 33-37, 42, 44-49, and 64-70. Applicants also contest this ground of rejection because McIntyre teaches away from the aspects cited in Guyett and, therefore, the alleged combination is impermissible. For

purposes of this section, three groups of claims are argued separately: (i) claims 33-37, 42, 45, and 67; (ii) claims 44 and 46-49; and (iii) claims 64-66 and 68-70.

Applicable Law

A claimed invention is unpatentable if the differences between it and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the pertinent art.⁵ Obviousness under 35 U.S.C. § 103 is a legal conclusion based on underlying factual determinations.⁶ The underlying factual determinations include (1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) the differences between the claimed invention and the prior art, and (4) objective indicia of non-obviousness.⁷

The Federal Circuit has stated that to reject claims in an application under section 103, an examiner must show an unrebutted *prima facie* case of obviousness.⁸ To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art.⁹ “All words in a claim must be considered in judging the patentability of that claim against the prior art.”¹⁰

“What the prior art teaches, whether it teaches away from the claimed invention, and whether it motivates a combination of teachings from different references are questions of fact.”¹¹ The Supreme Court reaffirmed the requirement that an obviousness analysis should be made explicit to facilitate review.¹² “Every case, particularly those raising the issue of obviousness under section 103, must necessarily be decided upon its own facts.”¹³ “The invention must be viewed not with the blueprint drawn by the inventor, but in the state of the art that existed at the time.”¹⁴ In this regard, maintaining

⁵ 35 U.S.C. § 103(a) (2000).

⁶ *Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1164, 77 U.S.P.Q.2d 1865, 1869 (Fed. Cir. 2006).

⁷ *KSR Intern. Co. v. Teleflex Inc.*, --- U.S. ---, 2007 WL 1237837, *12 (2007), citing *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

⁸ *In re Rouffet*, 149 F.3d 1350, 47 U.S.P.Q.2d 1453 (Fed. Cir. 1998).

⁹ *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974).

¹⁰ *In re Wilson*, 424 F.2d 1382, 1385, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970).

¹¹ *In re Fulton*, 391 F.3d 1195, 1199-1200, 73 U.S.P.Q.2d 1141, 1144 (Fed. Cir. 2004).

¹² *KSR Intern. Co. v. Teleflex Inc.*, --- U.S. ---, 2007 WL 1237837, *13 (2007), *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

¹³ *In re Jones*, 958 F.2d 347, 350, 21 U.S.P.Q.2d 1941, 1943 (Fed. Cir. 1992).

¹⁴ *Interconnect Planning Co. v. Feil*, 774 F.2d 1132, 1138, 227 U.S.P.Q. 543, 547 (Fed. Cir. 1985).

objectivity in the obviousness inquiry is accomplished by resolving the level of ordinary skill in the art.¹⁵

A prior art reference that “teaches away” from a given combination may negate a motivation to modify the prior art to meet the claimed invention.¹⁶ “A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.”¹⁷ Thus, even if the Examiner makes out a *prima facie* case of obviousness, Appellants may rebut this presumption by showing that the prior art teaches away from the claimed invention.¹⁸

Application of Law to the Facts #1 – Claims 33-37, 42, 45, and 67

Claims 33-37, 42, 44-49 and 64-70 stand rejected as being allegedly obvious over Guyett in view of McIntyre. This ground of rejection should be reversed, most notably because the rationale upon which the rejection is premised does not meet the statutory and judicial threshold for showing a *prima facie* case of obviousness. Appellants also contest this ground of rejection because McIntyre teaches away from the aspects cited in Guyett, thereby refuting the assertions of the Examiner that the references are properly combinable.

Claims 33 and 67 require the following three steps (in addition to the other steps recited in each respective claim):

- gathering data associated with the consumer’s interactions with the present interactive advertising message/computerized game;
- generating a statistical report from the data; and
- providing the statistical report to the commercial entity.

On page 7 of the final Office action it is admitted by the Examiner that Guyett does not specify generating a statistical report and sending it to the commercial entity as

¹⁵ *Ryko Mfg. Co. v. Nu-Star, Inc.*, 950 F.2d 714, 718, 21 U.S.P.Q.2d 1053, 1057 (Fed. Cir. 1991).

¹⁶ *See Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1165, 77 U.S.P.Q.2d 1865, 1870 (Fed. Cir. 2006).

¹⁷ *In re Kahn*, 441 F.3d 977, 990, 78 U.S.P.Q.2d 1329, 1338 (quoting *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)) (internal quotation marks omitted).

¹⁸ *In re Geisler*, 116 F.3d 1465, 1471, 43 U.S.P.Q.2d 1362, 1364 (Fed. Cir. 1997).

recited by claims 33 and 67. Nevertheless, the final Office action argues that McIntyre “teaches a statistical report that keeps track of how many times a game is played and the sending of this report to sponsors of the game (Paragraph 0008).”¹⁹ This interpretation of McIntyre is in err.

McIntyre discloses a computer game where advertising images of various sponsors are included in the game, where the game system keeps track of the use of the advertising images so that the sponsors can be appropriately billed, but not actually contacted. Paragraph [0008] of McIntyre cited in the final Office action is elaborated on in paragraph [0042]:

The host server may keep track of the number of times the games are played and to which sponsor the game is being played. In another form of the present invention, the games may be dispensed by the host server 26 in accordance with a predetermined schedule. Thus keeping track of the number of times a sponsor message contest and/or message is received. This also allows a sponsor to be billed for the actual number of times games have been played on their behalf.

Later, at paragraph [0043], McIntyre explicitly notes that the object of using the host server 26 is to *avoid contacting the sponsor*.

By using a host server 26, the actual sponsor need not ever be actually contacted.

If anything, McIntyre *teaches away* from providing any information, such as a statistical report, to the sponsor. In other words, McIntyre neither discloses the generation of any statistical report as Appellants claim, nor does McIntyre disclose the step of providing the generated statistical report to the commercial entity as claimed by Appellants. At best, McIntyre discloses the step of billing a sponsor without substantive feedback. But this is in stark contrast to what Appellants claim.

The significance between what McIntyre discloses and Appellants' claim cannot be underscored enough. First, Appellants claimed statistical report is not the same thing as McIntyre's bill. Second, the bill of McIntyre has no relation to the qualitative consumer's interactions with the advertising message/computerized game as claimed by

¹⁹ September 6, 2006 Office action, p. 7.

Appellants. Instead, McIntyre's game is merely passive and only tracks the number of times a sponsor's advertising is displayed to generate the billed amount. Finally, McIntyre fails to disclose sending a report or anything similar to the commercial entity, whereas Appellants claim "providing the statistical report to the commercial entity."

Consequently, even if Guyett and McIntyre were combined as stated in the final Office action for arguments sake, one of ordinary skill still would still not reach the invention as recited in claims 33 or 67 because neither reference discloses: (a) generating a statistical report from the data [associated with the consumer's interactions with the present interactive advertising message/computerized game]; or (b) providing the statistical report to the commercial entity.

In an apparent attempt to compensate for the failings of the prior art, the Examiner makes an unsubstantiated argument that "[i]t would have been obvious to one having ordinary skill in the art at the time of the invention was made to provide a report to the commercial entity. This would aid the commercial entity in knowing how well-received their game is."²⁰ Appellants respectfully disagree.

Significantly, neither Guyett nor McIntyre provides any indication whatsoever of providing a statistical report to advertisers as recited in claims 33 and 67. Guyett only collects data associated with consumer's interactions to determine whether a computer payoff or prize is due the consumer,²¹ while McIntyre teaches the antithesis of statistical reporting to advertisers. As discussed previously, McIntyre only counts the occurrences of sponsor ads provided to a game. More importantly, McIntyre teaches those skilled in the art *not* to contact the advertisers other than for billing purposes.²² It's no wonder, then, that neither of these references discloses Appellants' claimed steps of generating and providing the statistical report.

Consequently, for at least the above reasons, it is respectfully submitted that independent claims 33 and 67 are allowable over the combination of Guyett and McIntyre as these references fail to disclose each and every one of the limitations of claims 33 and 67. Moreover, even if it is presumed solely for arguments sake that Guyett

²⁰ September 6, 2006 Office action, p. 7.

²¹ U.S. Patent No. 6,764,395 to Guyett, col. 10, lines 17-20, as cited by the September 6, 2006 Office action.

²² U.S. Pub. Patent App. No. 2003/0191690 to McIntyre et al., ¶ [0043].

and McIntyre disclose each of the limitations of claims 33 and 67, McIntyre clearly teaches away from being combined with Guyett to read on Appellants' claims by explicitly disclosing the objective of *not* directly contacting advertisers. Additionally, claims 34-49 and 64-66 that depend from claim 33 and claims 68-70 that depend from claim 67 are allowable for at least the same reasons as given above for claims 33 and 67. Thus, Appellants request reversal of the 35 U.S.C. § 103(a) ground of rejection as applied to claims 33-37, 42, 45, and 67.

Application of Law to the Facts #2 – Claims 44 and 46-49

With respect to claims 44 and 46-49, the Examiner admits that Guyett does not specify that the game gathers data related to brand type, tag lines, product benefits, imagery, and communication language in particular.²³ The Examiner takes official notice, and the Appellants do not disagree, that it is old and well known for advertisements to frequently contain brand type, tag lines, product benefits, imagery, and communication language.²⁴ Consequently, the Examiner asserts that it would have been “obvious to one having ordinary skill in the art at the time of the invention was made to gather information related not only to advertisements in general, but also related to the above categories,” because “[t]his would allow the advertiser to understand more about how their product is doing in the marketplace.”²⁵ For much the same reasons as given above for claims 33 and 67, Appellants respectfully disagree.

Just because such categories of data may be present in particular forms of advertisements, it does not follow that there exists any disclosure in either Guyett or McIntyre to gather or process such data. While such a step might be advantageous *in hindsight*, the Examiner has not articulated or referenced any objective evidence that the advertiser in Guyett or McIntyre wished to understand (i.e., wanted feedback) how their brand type, tag lines, product benefits, imagery and communication language were being understood or recognized by the ad-viewers/game-players. As mentioned above with respect to claims 33 and 67, Guyett simply collects data to determine a prize amount to the game player, while McIntyre teaches away from directly contacting advertisers.

²³ September 6, 2006 Office action, p. 8.

²⁴ September 6, 2006 Office action, p. 8.

²⁵ September 6, 2006 Office action, pp. 8-9.

Consequently, for at least the above reasons, it is respectfully submitted that claims 44 and 46-49 are allowable in view of Guyett and McIntyre as these references fails to disclose each and every one of the limitations of these claims. Moreover, even if it is presumed solely for arguments sake that Guyett and McIntyre disclose each of the limitations of claims 44 and 46-49, McIntyre clearly teaches away from being combined with Guyett to read on Appellants claims by explicitly disclosing the objective of *not* directly contacting advertisers. By explicitly teaching away from contacting advertisers, McIntyre by itself refutes the assertions by the Examiner that those skilled in the art would want to know, by way of advertisements, how their product is doing in the marketplace.²⁶ Thus, claims 44 and 46-49 stand in condition for allowance. Appellants therefore request reversal of the 35 U.S.C. § 103(a) ground of rejection as applied to claims 44 and 46-49.

Application of Law to the Facts #3 – Claims 64-66 and 68-70

Claims 64-66 and 68-70 are separately distinguishable from the combination of Guyett with McIntyre. For example, claims 65 and 68 recite that the statistical report illustrates a number of first-time accesses of consumers to the interactive advertising message over a period of time, while claims 66 and 69 recite that the statistical report illustrates a comparison of consumers who were able to identify the commercial entity's logo, trademark, trade name, tag line, and/or product name verses a competitor's logo, trademark, trade name, tag line, and/or product name, and claims 66/70 recite that the statistical report of claims 33/67 illustrate information related to the consumer's interaction time with the interactive advertising message.

The Examiner asserts in the final Office action that neither Guyett nor McIntyre discloses data content in any statistical report. But the Examiner argues, citing In re Gulack and In re Lowry, that these data content limitations are

only found in the nonfunctional descriptive material and are not functionally involved in the method (or structurally programmed) steps recited. The steps would be performed the same regardless of data

²⁶ September 6, 2006 Office action, pp. 8-9.

content. Thus, this descriptive material will not distinguish the claimed invention from the prior art in terms of Patentability....²⁷

Appellants respectfully disagree.

Each of the recited steps of claims 64-66 and 68-70 are functionally related to, and involved with, the statistical report itself and with the recited step, in claim 33/67, of “gathering data associated with the consumer’s interactions with the present interactive advertising message.” Thus, claims 64-66 and 68-70 are very much like the claims that the Federal Circuit found *patentable* in In re Gulack. In In re Gulack, the invention-at-issue consisted of: (1) a band, ring, or set of concentric rings; (2) a plurality of individual digits imprinted on the band or ring at regularly spaced intervals; and (3) an algorithm by which the appropriate digits are developed. The rejection by the PTO was premised upon the fact that a circular band with items printed upon it was well known in the art. The Federal Circuit *reversed*, finding that the numbers printed on the band had a functional relationship to the band itself. Similarly, in the present case, the material printed on the statistical report has a functional relationship to the statistical report itself and to the method for generating the statistical report. Consequently, the rejection of claims 64-66 and 68-70 is traversed for at least this additional reason. Thus, Appellants request reversal of the 35 U.S.C. § 103(a) ground of rejection as applied to claims 64-66 and 68-70.

Ground of Rejection #2

I. Claims 38-41 and 43 are improperly rejected under 35 U.S.C. § 103(a) because the alleged combination of Guyett, McIntyre, and Forrest fails to disclose all of Appellants’ claimed limitations

Summary

In the final Office action, claims 38-41 and 43 are allegedly unpatentable over U.S. Patent No. 6,764,395 to Guyett (“Guyett”) in view of U.S. Patent Application Publication No. 2003/0191690 to McIntyre (“McIntyre”), in further view of U.S. Patent No. 5,679,075 to Forrest (“Forrest”). Appellants are contesting this ground of rejection as the combination of Guyett, McIntyre, and Forrest fails to disclose each and every one

²⁷ September 6, 2006 Office action, pp. 8-9.

of the limitations recited in Appellants' claims 38-41 and 43. Applicants also contest this ground of rejection because McIntyre teaches away from the aspects cited in Guyett and/or Forrest, thus the alleged combination is impermissible.

Applicable Law

A claimed invention is unpatentable if the differences between it and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the pertinent art.²⁸ Obviousness under 35 U.S.C. § 103 is a legal conclusion based on underlying factual determinations.²⁹ The underlying factual determinations include (1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) the differences between the claimed invention and the prior art, and (4) objective indicia of non-obviousness.³⁰

The Federal Circuit has stated that to reject claims in an application under section 103, an examiner must show an un rebutted *prima facie* case of obviousness.³¹ To establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art.³² "All words in a claim must be considered in judging the patentability of that claim against the prior art."³³

"What the prior art teaches, whether it teaches away from the claimed invention, and whether it motivates a combination of teachings from different references are questions of fact."³⁴ The Supreme Court reaffirmed the requirement that an obviousness analysis should be made explicit to facilitate review.³⁵ "Every case, particularly those raising the issue of obviousness under section 103, must necessarily be decided upon its own facts."³⁶ "The invention must be viewed not with the blueprint drawn by the

²⁸ 35 U.S.C. § 103(a) (2000).

²⁹ *Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1164, 77 U.S.P.Q.2d 1865, 1869 (Fed. Cir. 2006).

³⁰ *KSR Intern. Co. v. Teleflex Inc.*, --- U.S. ----, 2007 WL 1237837, *12 (2007), citing *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966).

³¹ *In re Rouffet*, 149 F.3d 1350, 47 U.S.P.Q.2d 1453 (Fed. Cir. 1998).

³² *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974).

³³ *In re Wilson*, 424 F.2d 1382, 1385, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970).

³⁴ *In re Fulton*, 391 F.3d 1195, 1199-1200, 73 U.S.P.Q.2d 1141, 1144 (Fed. Cir. 2004).

³⁵ *KSR Intern. Co. v. Teleflex Inc.*, --- U.S. ----, 2007 WL 1237837, *13 (2007), *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006).

³⁶ *In re Jones*, 958 F.2d 347, 350, 21 U.S.P.Q.2d 1941, 1943 (Fed. Cir. 1992).

inventor, but in the state of the art that existed at the time.”³⁷ In this regard, maintaining objectivity in the obviousness inquiry is accomplished by resolving the level of ordinary skill in the art.³⁸

A prior art reference that “teaches away” from a given combination may negate a motivation to modify the prior art to meet the claimed invention.³⁹ “A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.”⁴⁰ Thus, even if the Examiner makes out a *prima facie* case of obviousness, Appellants may rebut this presumption by showing that the prior art teaches away from the claimed invention.⁴¹

Application of Law to the Facts – Claims 38-41 and 43

Claims 38-41 and 43 stand rejected as being allegedly obvious over Guyett in view of McIntyre, in further view of Forrest. This ground of rejection should be reversed, most notably because the rationale upon which the rejection is premised does not meet the statutory and judicial threshold for showing a *prima facie* case of obviousness.

Claim 38-41 and 43 incorporate the limitations from claim 33 and require the following three steps (in addition to the other steps recited in each respective claim):

- gathering data associated with the consumer’s interactions with the present interactive advertising message/computerized game;
- generating a statistical report from the data; and
- providing the statistical report to the commercial entity.

On page 7 of the final Office action it is admitted by the Examiner that Guyett does not specify generating a statistical report and sending it to the commercial entity as recited by claims 33 and 67. Nevertheless, the final Office action argues that McIntyre “teaches a statistical report that keeps track of how many times a game is played and the

³⁷ *Interconnect Planning Co. v. Feil*, 774 F.2d 1132, 1138, 227 U.S.P.Q. 543, 547 (Fed. Cir. 1985).

³⁸ *Ryko Mfg. Co. v. Nu-Star, Inc.*, 950 F.2d 714, 718, 21 U.S.P.Q.2d 1053, 1057 (Fed. Cir. 1991).

³⁹ See *Medichem, S.A. v. Rolabo, S.L.*, 437 F.3d 1157, 1165, 77 U.S.P.Q.2d 1865, 1870 (Fed. Cir. 2006).

⁴⁰ *In re Kahn*, 441 F.3d 977, 990, 78 U.S.P.Q.2d 1329, 1338 (quoting *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994)) (internal quotation marks omitted).

⁴¹ *In re Geisler*, 116 F.3d 1465, 1471, 43 U.S.P.Q.2d 1362, 1364 (Fed. Cir. 1997)

sending of this report to sponsors of the game (Paragraph 0008).”⁴² This interpretation of McIntyre is in err.

McIntyre discloses a computer game where advertising images of various sponsors are included in the game, where the game system keeps track of the use of the advertising images so that the sponsors can be appropriately billed, but not actually contacted. Paragraph [0008] of McIntyre cited in the final Office action is elaborated on in paragraph [0042]:

The host server may keep track of the number of times the games are played and to which sponsor the game is being played. In another form of the present invention, the games may be dispensed by the host server 26 in accordance with a predetermined schedule. Thus keeping track of the number of times a sponsor message contest and/or message is received. This also allows a sponsor to be billed for the actual number of times games have been played on their behalf.

Later, at paragraph [0043], McIntyre explicitly notes that the object of using the host server 26 is to *avoid contacting the sponsor*.

By using a host server 26, the actual sponsor need not ever be actually contacted.

If anything, McIntyre *teaches away* from providing any information, such as a statistical report, to the sponsor. In other words, McIntyre neither discloses the generation of any statistical report as Appellants claim, nor does McIntyre disclose the step of providing that statistical report to the commercial entity as claimed by Appellants. At best, McIntyre discloses the step of billing a sponsor without substantive feedback. But this is in stark contrast to what Appellants claim.

The significance between what McIntyre discloses and Appellants' claim cannot be underscored enough. First, Appellants claimed statistical report is not the same thing as McIntyre's bill. Second, the bill of McIntyre has no relation to the qualitative consumer's interactions with the advertising message/computerized game as claimed by Appellants. Instead, McIntyre's game is merely passive and only tracks the number of times a sponsor's advertising is displayed to generate the billed amount. Finally,

⁴² September 6, 2006 Office action, p. 7.

McIntyre fails to disclose sending a report or anything similar to the commercial entity, whereas Appellants claim "providing the statistical report to the commercial entity."

Consequently, even if Guyett and McIntyre were combined as stated in the final Office action for arguments sake, one of ordinary skill still would still not reach the invention as recited in claims 33 or 67 because neither reference discloses: (a) generating a statistical report from the data [associated with the consumer's interactions with the present interactive advertising message/computerized game]; or (b) providing the statistical report to the commercial entity.

In an apparent attempt to compensate for the failings of the prior art, the Examiner makes an unsubstantiated argument that "[i]t would have been obvious to one having ordinary skill in the art at the time of the invention was made to provide a report to the commercial entity. This would aid the commercial entity in knowing how well-received their game is."⁴³ Appellants respectfully disagree.

Significantly, neither Guyett nor McIntyre provides any indication whatsoever of providing a statistical report to advertisers as recited in claims 33 and 67. Guyett only collects data associated with consumer's interactions to determine whether a computer payoff or prize is due the consumer,⁴⁴ while McIntyre teaches the antithesis of statistical reporting to advertisers. As discussed previously, McIntyre only counts the occurrences of sponsor ads provided to a game. More importantly, McIntyre teaches those skilled in the art *not* to contact the advertisers other than for billing purposes.⁴⁵ It's no wonder, then, that neither of these references discloses Appellants' claimed steps of generating and providing the statistical report.

For at least the foregoing reasons, claims 38-41 and 43 are in condition for allowance. However, the limitations specific to claims 38-41 and 43 provide independent support for the proposition that these claims are allowable.

⁴³ September 6, 2006 Office action, p. 7.

⁴⁴ U.S. Patent No. 6,764,395 to Guyett, col. 10, lines 17-20, as cited by the September 6, 2006 Office action.

⁴⁵ U.S. Pub. Patent App. No. 2003/0191690 to McIntyre et al., ¶ [0043].

As to the limitations specific to claims 38-41 and 43, the Examiner admits that Guyett “doesn’t teach the providing of a next of the plurality of puzzles based on consumer performance.”⁴⁶ The Examiner then proffers in the final Office action:

It would have been obvious to one having ordinary skill in the art at the time the invention was made to select a puzzle for the user based on performance of the user. This would give the player a greater sense of satisfaction.⁴⁷

In conclusion, the Examiner proffers that claims 38-41 and 43 are unpatentable in view of Guyett combined with McIntyre combined with Forrest. Appellants respectfully disagree.

Each of claims 38-41 and 43 includes limitations requiring the selection of a next interactive advertising message based upon the feedback received from the consumer and providing the next advertising message. The bottom line is that none of the three references cited disclose these limitations. For this reason alone, claims 38-41 and 43 are in condition for allowance.

If one were to presume for arguments sake that the three references in toto disclose each of the recited limitations of claims 38-41 and 43, there is no indication in any Office action addressing Appellants’ argument that McIntyre teaches away from Appellants’ claimed invention. McIntyre explicitly identifies as one of his objectives *not* substantively contacting the advertiser.⁴⁸ How then could it be alleged that such a disclosure is consistent with Appellants’ claims or objectives recited in the disclosure of the instant invention? Appellants are unaware of any substantive answer to this question proffered in any prior correspondence from the Office.

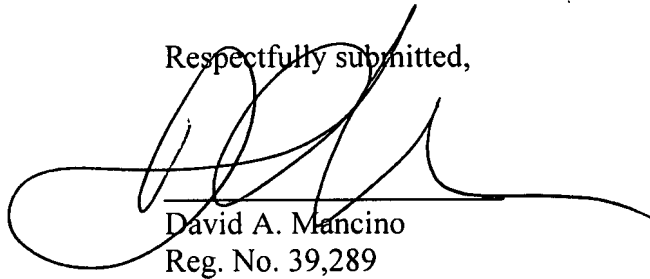
In light of the foregoing, it is respectfully submitted that claims 38-41 and 43 are in condition for allowance. The three reference cited against these claims do not disclose each and every one of the claimed limitations and, even if the combination did, McIntyre teaches away from Appellants’ claims rendering such a combination impermissible. Thus, Appellants request reversal of the 35 U.S.C. § 103(a) ground of rejection as applied to claims 38-41 and 43.

⁴⁶ September 6, 2006 Office action, p. 9.

⁴⁷ September 6, 2006 Office action, p. 9.

⁴⁸ U.S. Patent App. Pub. No. 2003/0191690 to McIntyre, ¶ [0043].

Respectfully submitted,



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(8) Claims Appendix

Claims on Appeal:

1 - 32. (Canceled)

33. (Previously Amended) A computerized method for measuring a consumer's perception of a commercial entity's brand equity, logo, trademark, tradename, tag line, product name and the like, comprising the steps of:

- providing a present interactive advertising message to the consumer;
- allowing the consumer to interact with the present interactive advertising message;
- gathering data associated with the consumer's interactions with the present interactive advertising message;
- generating a statistical report from the data; and
- providing the statistical report to the commercial entity.

34. (Original) The computerized method of claim 33, wherein the present interactive advertising message is provided to a computer accessible by the consumer, the computer having a display screen and an input device.

35. (Original) The computerized method of claim 33, wherein the present interactive advertising message is provided to a display device accessible by the consumer, the display device having an associated input device.

36. (Original) The computerized method of claim 33, including the step of obtaining demographic information pertaining to the consumer.

37. (Original) The computerized method of claim 36, wherein the step of providing the present interactive advertising message to the consumer includes the step of selecting the present interactive advertising message from a group of interactive

advertising messages based, at least in part, upon at least a portion of the demographic information obtained for the consumer.

38. (Original) The computerized method of claim 37, further comprising the steps of:

selecting a next interactive advertising message based, at least in part, upon at least a portion of the data associated with the consumer's interactions with the present interactive advertising message; and

providing the next interactive advertising message to the consumer.

39. (Original) The computerized method of claim 38, further comprising the step of gathering data associated with the consumer's interactions with the next advertising message.

40. (Original) The computerized method of claim 37, further comprising the steps of:

selecting a next interactive advertising message based, at least in part, upon a combination of at least a portion of the data associated with the consumer's interactions with the present interactive advertising message and at least a portion of the demographic information obtained for the consumer; and

providing the next interactive advertising message to the consumer.

41. (Original) The computerized method of claim 40, further comprising the step of gathering data associated with the consumer's interactions with the next advertising message.

42. (Original) The computerized method of claim 33, wherein the present interactive advertising message is provided within the context of an interactive game.

43. (Original) The computerized method of claim 33, further comprising the steps of:

selecting a next interactive advertising message based, at least in part, upon the consumer's interactions with the present interactive advertising message; and
providing the next interactive advertising message to the consumer.

44. (Original) The computerized method of claim 33, wherein the step of gathering data associated with the consumer's interactions with the present advertising message, includes the step of gathering data related to the consumer's awareness of the commercial entity's brand.

45. (Original) The computerized method of claim 33, wherein the step of gathering data associated with the consumer's interactions with the present advertising message, includes the step of gathering data related to the consumer's awareness of the commercial entity's product.

46. (Original) The computerized method of claim 33, wherein the step of gathering data associated with the consumer's interactions with the present advertising message, includes the step of gathering data related to the consumer's recall of the commercial entity's tagline.

47. (Original) The computerized method of claim 33, wherein the step of gathering data associated with the consumer's interactions with the present advertising message, includes the step of gathering data related to the consumer's recall of the benefit of the commercial entity's product/service.

48. (Original) The computerized method of claim 33, wherein the step of gathering data associated with the consumer's interactions with the present advertising message, includes the step of gathering data related to the consumer's image association with the commercial entity's brand equity.

49. (Original) The computerized method of claim 33, wherein the step of gathering data associated with the consumer's interactions with the present advertising message, includes the step of gathering data related to the consumer's language association with the commercial entity's brand equity.

50 - 63. (Canceled)

64. (Previously Added) The computerized method of claim 33, wherein the statistical report will illustrate a number of first-time accesses of consumers to the interactive advertising message over a period of time.

65. (Previously Added) The computerized method of claim 33, wherein the statistical report will illustrate a comparison of the number of consumers who were able to identify at least one of the commercial entity's logo, trademark, tradename, tag line, and product name versus at least one of a competitor's logo, trademark, tradename, tag line, and product name.

66. (Previously Added) The computerized method of claim 33, wherein the statistical report will illustrate information related to the consumer's interaction time with the interactive advertising message.

67. (Previously Added) A computerized method for at least one of providing advertising to a consumer and for gathering statistical data from the consumer associated with at least one of a commercial entity's products and services, comprising the steps of:
providing a computerized game to a consumer, the game including the step of testing the consumer's ability to recognize a marketing object associated with the commercial entity, the marketing object taken from a group consisting of: the commercial entity's logo, the commercial entity's trademark, the commercial entity's tradename, the commercial entity's tag line, the commercial entity's product name, a competitor's logo, a competitor's trademark, a competitor's tradename, a competitor's tag line and a competitor's product name;

gathering data associated with the consumer's interactions with the computerized game;
generating a statistical report from the data; and
providing the statistical report to the commercial entity.

68. (Previously Added) The computerized method of claim 67, wherein the statistical report will illustrate a number of first-time accesses of consumers to the computerized game over a period of time.

69. (Previously Added) The computerized method of claim 67, wherein the statistical report will illustrate a comparison of the number of consumers who were able to identify the commercial entity's marketing object versus a competitor's marketing object.

70. (Previously Added) The computerized method of claim 67, wherein the statistical report will illustrate information related to the consumer's interaction time with the computerized game.

- Appellants' Amended Appeal Brief
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(9) Evidence Appendix

None.

- Appellants' Amended Appeal Brief
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(10) Related Proceedings Appendix

There is no decision Appellants are aware of necessary to be listed pursuant to 37 C.F.R. §§ 41.37(c)(1)(ii) or 41.37(c)(1)(x).